

**MONTGOMERY COUNTY, STATE OF MARYLAND
COMMISSION ON COMMON OWNERSHIP COMMUNITIES**

**RICHARD HENRY and
BRENDA HENRY,**

Complainants,

v.

**BEL PRE RECREATIONAL
ASSOCIATION,**

Respondent.

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: Case No. 40-09

: Panel Pre-Hearing Conference Date:
March 10, 2010

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Decision Issued: July 2, 2010
: (Panel: Burgess, Dubin and Farrar)

Memorandum Decision and Order By: Ursula Koenig Burgess

MEMORANDUM DECISION AND ORDER

The above-captioned case came before a Hearing Panel of the Commission on Common Ownership Communities for Montgomery County, Maryland ("Commission") for a pre-hearing conference to resolve two outstanding motions in this matter - the Complainants' Motion for Default Judgment and the Respondent's Motion to Dismiss. After reviewing the parties' written motions and hearing argument and reviewing the motions, the panel finds, determines and orders as follows:

PROCEDURAL BACKGROUND

On or about July 18, 2009, the Complainants, Richard and Brenda Henry (collectively "the Henrys"), filed this Complaint with the Commission regarding the lack of enforcement action taken by the Respondent, Bel Pre Recreational Association ("Bel Pre" or "Association"), through its Board of Directors, to compel their adjacent neighbor to trim the hedge between their properties to 42 inches. (Record ("R.") at 1-11). The Complainants averred that the Board's failure to enforce the Association's covenants,

which states that hedges are to be 42 inches or less, was a breach of fiduciary duty. (R. at 3). They asked the Commission to order the Board to enforce the covenants and tell their adjacent neighbors to maintain their shrubs at 42 inches. (R. at 3).

On July 20, 2009, the Commission sent a letter to Daniel Keating, the Association's President advising him that a Complaint had been filed against the Association and that the Association had thirty days to file a response. (R. at 174). On August 17, 2009, counsel for the Association sent a letter to the Commission staff requesting an extension to file the response in 30 days. (R. at 176). Although Commission staff exchanged e-mails with counsel asking why a 30-day extension was necessary (R. at 177), there was no decision sent to counsel granting or denying his request. On August 24, the Henrys filed an objection to the Association's request for an extension. (R. at 178). On September 2, 2009, the Henrys filed a request that an Order of Default be entered. (R. at 186). On September 21, the Association filed a response to the Complaint and a Motion to Dismiss for lack of jurisdiction.¹ (R. at 187-203).

The parties agreed to mediation and the result of the mediation was that a letter was that the Board President was to send the adjoining neighbors a letter, signed by the Henrys, asking that the hedge be reduced to 42 inches. (R. at 218). The neighbors responded that they were not going to reduce the hedge and that all future correspondence was to go to their attorney. (R. at 220). Accordingly, the parties asked that the Commission review the matter for jurisdiction.

On January 6, 2010, the Commission accepted jurisdiction of the Complaint, but

¹ The panel notes that the answer was filed within 30 days of the original due date as requested by the Respondent's counsel. The 30th day, September 19, 2009, was a Saturday, so pursuant to the Maryland Rules, it was timely filed on the first Monday after the 30th day.

made no decisions on the motions. (R. at 230). A hearing was scheduled for March 10, 2010. On February 17, 2010, counsel for the Association asked that a pre-hearing conference be scheduled to address the outstanding motions. The panel granted his request and scheduled the pre-hearing conference for the date originally scheduled for the hearing.

CONCLUSIONS OF LAW

I. Henrys' Motion for Default Judgment

Maryland courts have consistently held that default judgments should not be used as punitive measures to punish a party who fails to comply with a procedural requirement. See Curry v. Hillcrest Clinic, Inc., 337 Md. 412, 434 (1995).

As discussed in a 2001 opinion of the United States District Court for the District of Maryland,

Maryland courts ordinarily exercise their discretion in favor of a defaulting party if the party establishes that there is a meritorious defense and shows that its fault was excusable. See Ryan v. Johnson, 220 Md. 70, 150 A.2d 906 (1959) (finding abuse of discretion in trial court's refusal to vacate default where defendant proffered meritorious defense) (additional internal citations omitted). In the cases brought to the attention of the Court where the Maryland Court of Appeals upheld a trial court's refusal to vacate a default judgment, the defaulting party either lacked a meritorious defense, or the trial court's discretion was confined under the old Maryland default judgment rule. (Internal citation omitted) (Footnote omitted).

Royal Ins. Co. of America v. Miles & Stockbridge, P.C., 133 F. Supp. 2d 747 (D. Md. 2001).

Here, counsel for Bel Pre requested an additional 30 days to respond to the Complaint, and he was never advised whether his request was granted or denied. He subsequently filed a response to the Complaint in compliance with the extension date he requested and he raised several substantive defenses, including an argument that

the Commission lacks jurisdiction over the Complaint. There was no allegation made that the late answer caused any harm or injury to the Henrys and in their opposition to the request for the extension of time, the Henrys argue that the Association had adequate time to respond and should not be given additional time – there is no argument that the Association lacked a defense to the Complaint. Notably, if the Commission lacks jurisdiction over the Complaint, any entry of default judgment would be meaningless and unenforceable. In short, if this panel were to grant the Henrys’ Motion for Default Judgment, it would be operating as a punitive measure by preventing the Association from defending the Complaint and presenting the substantive defenses raised. Accordingly, the Henrys’ Motion for Default Judgment is denied.

II. Bel Pre’s Motion to Dismiss for Lack of Jurisdiction.

At the outset, it is important to note that the acceptance of jurisdiction by the Commission does not preclude the panel from reviewing the issue and rendering a decision on whether jurisdiction exists. See Montgomery County Code §10B-13 (The hearing panel must hold a hearing unless “the dispute is clearly not within the jurisdiction of the Commission.”). *See, e.g., Prue v. Manor Spring HOA*, CCOC #39-09 (March 16, 2010) (hearing panel can overturn Commission decision to accept jurisdiction because it has the benefit of a full development of the facts at a hearing).

The Commission has very limited jurisdiction, which is itemized in Chapter 10B, Sections 8 and 9, of the Montgomery County Code (“Code”). The Commission is authorized to hear a dispute between owners and their community associations. The Code specifically defines dispute as:

- (A) the authority of a governing body, under any law or association document, to:

- i. *require a person to take any action, or not to take any action, involving a unit;*
- ii. require any person to pay a fee, fine, or assessment;
- iii. spend association funds; or
- iv. alter or add to a common area or element; or
- (B) the failure of a governing body, when required by law of an association document, to:
 - i. properly conduct an election;
 - ii. give adequate notice of a meeting or other action;
 - iii. properly conduct a meeting;
 - iv. properly adopt a budget or rules;
 - v. maintain or audit books and records; or
 - vi. allow inspection of books and records

See, Montgomery County Code, Section 10B-8 (emphasis added). In fact, on the Commission's complaint form, these specific sections are set out verbatim and the form directs the complainant(s) to indicate which section(s) are applicable. (R. at 2).

Notably, on the Henrys' form, they did not indicate which one of these sections was applicable to the Complaint. (R. at 2). Instead, they created new lines on the form and checked them. (R. at 2). At the prehearing conference, Mrs. Henry stated that section (A) (i) of Section 10B-8 applied to the Complaint. The panel disagrees.

The Complaint focuses on the Board's decision to forgo any additional enforcement action against the Henrys' adjacent neighbor to reduce the height of the hedges. There is no argument in the Complaint that the Association lacks the authority to enforce a height restriction on hedges; rather it is the Henrys' argument that the Board must take action and compel the adjacent owners to reduce their hedges. The Henrys argue that the Board made the wrong decision in voting to not pursue their owner. Section 10B-8(3)(A)(i) only applies to the Board's decisions *to compel* an owner or resident to take an action; it does not apply to the Board's *failure or refusal to compel* an owner or resident to take an action.

The panel further finds that the Complaint is based on a situation that the Code has specifically excluded as being a basis for jurisdiction. Section 10B-8(4) states:

- (4) Dispute does not include any disagreement that only involves:
 - (A) title to any unit or any common area or element;
 - (B) the percentage interest or vote allocable to a unit;
 - (C) the interpretation or enforcement of any warranty;
 - (D) the collection of an assessment validly levied against a party; or
 - (E) **the judgment or discretion of a governing body in taking or deciding not to take any legally authorized action.**
- (emphasis supplied).

The Complaint fits squarely within the exception noted in section (4)(E) because it challenges a *decision* made by the Board to forgo taking additional enforcement action that the Board is authorized to take under the Association's governing documents. Accordingly, the Complaint falls outside the jurisdiction granted to the Commission.

Notably, the Complaint made several statements which appeared to allege that the Board was selectively enforcing the Association's governing documents, including an allegation that there was a conflict of interest with one of the Board members. However, when asked directly whether the Association was selectively enforcing the documents, Mrs. Henry admitted that there were other owners in the community with hedges that were too high. The nature of the selective enforcement allegation is that the association is taking action only against select owners who have violations on their properties and not against other owners with that violation. Here, Mrs. Henry advised the panel that the Association is consistently not enforcing the hedge height in the community. Accordingly, we could not find that any additional basis which would bring the Complaint under the Commission's jurisdiction.

The panel has not reached into the merits of this case (i.e., whether the Board's actions were appropriate, or whether the board is violating the governing documents by failing to take action to enforce them). This decision is based solely on the jurisdictional restraints imposed by the Montgomery County Code.

ORDER

The Complainants' Motion for Default Judgment is denied and the Respondent's Motion to Dismiss is granted.

Commissioners Dubin and Farrar concurred in this opinion.

Any party aggrieved by the action of the Commission may file an appeal to the Circuit Court of Montgomery County, Maryland, within thirty (30) days of the date of this Order pursuant to the Maryland Rules of Procedure governing administrative appeals

Ursula Koenig Burgess, Panel Chair
July 2, 2010